REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, 30 June 2014
Ref. No.: RK664/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI227/13

Applicant

Izjadin Shehu

Constitutional review of the Judgment Rev. No. 93/2013 of the Supreme Court of Kosovo, of 20 September 2013

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Referral was submitted by Mr. Izjadin Shehu, from Ferizaj (hereinafter, the Applicant).

Challenged Decision

2. The Applicant challenges the Judgment Rev. No. 93/2013 of the Supreme Court of Kosovo, dated 20 September 2013, which rejected as ungrounded the Applicant's request for revision following the judgments of the Municipal Court in Ferizaj and the Court of Appeals which rejected his claim against Kosovo Electricity Corporation (hereinafter, KEC) for annulment of the notification on termination of the employment contract.

3. The Judgment of the Supreme Court was served on him on 11 October 2013.

Subject Matter

4. The subject matter is the constitutional review of the challenged Judgment, which allegedly *"violated his rights guaranteed by the Constitution, namely Article 3, paragraph 2 [Equality before the Law], Article 24 [Equality before the Law] Article 31 [Right to Fair and Impartial Trial], and Article 6 [Right to a Fair Trial] of the European Convention on Human Rights (hereinafter, ECHR)".*

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 22 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law).

Proceedings before the Court

6. On 16 December 2013, the Applicant submitted the Referral to the Court.

7. On 15 January 2014, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (presiding), Kadri Kyeziu and Arta Rama-Hajrizi.

8. On 22 April 2014, the Court notified the Applicant on the registration of the Referral. On the same date, the Court also informed the Supreme Court of the Referral.

9. On 20 May 2014 the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court to declare the Referral as inadmissible.

Summary of facts

10. On 1 February 2005, the Applicant entered an employment contract with KEC.

11. On 28 October 2008, KEC notified the Applicant on the termination of the employment contract.

12. On 15 December 2008, KEC filed a criminal charge (No. 2008MA25/2) against the Applicant for having allegedly committed the criminal offence of theft.

13. On 3 September 2009, the Municipal Public Prosecutor (PP. No. 22/09) dismissed the criminal charge of KEC against the Applicant and held that *"considering the situation determined by the calibration sector we consider that no evidence proves the reasonable suspicion that the defendant committed the criminal offence charged with by the criminal charge, therefore, the criminal charge is dismissed."*

14. On an unknown date, the Applicant requested the Municipal Court in Ferizaj the annulment of the termination of his employment contract, reinstatement at his workplace and compensation of income deriving from the employment contract. The Applicant claimed that *"the notification for termination of the employment contract was based on Article 11, paragraph 3, item b of the Essential Labor Law and Article 8, paragraph 13 of the KEC Regulation on Labor that encloses theft of KEC property – theft of electricity, while the expertise performed on the electric meter – calibration center has determined that there is no irregularity found inside the meter, adding that only the meter was damaged while the counter was not manipulated (...) therefore based on the fact that the only reason for termination of employment contract was theft of electricity, and this conclusion is proven to be unfounded by the (...) calibration center."*

15. On 29 January 2008, the Municipal Court (Judgment C. No. 396/08) rejected as unfounded the request of the Applicant.

16. The Municipal Court held that

> *"The respondent respected all the legal-procedural provisions when notifying the claimant for the termination of the employment contract" and "[...] although the claimant refers to the notification of the Municipal Public Prosecutor in Ferizaj PP. No. 22/09, dated 3 September 2009, according to which Izjadin Shehu was acquitted of the criminal charge for the criminal offence (...) of theft, the civil aspect of the of the claimant's accountability still exists [...].*
>
> *[...] therefore, considering the fact that the claimant connected the new meter in an unauthorized way and spent electricity whilst not being authorized, presented unauthorized use of employer's assets, therefore it presents behavior of serious nature after which it would be unreasonable to expect extension of the employment relationship (Article 11.3 item (d) of the UNMIK Regulation No. 2001/27), therefore the Court considers the notification for termination of the employment contract No. 949, dated 28 October 2008, (...) to be legal, same with the Decision No. 7302, dated 10 November 2008, issued by the respondent following the appeal submitted by the claimant."*

17. The Applicant appealed to the District Court in Prishtina, due to essential violation of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of material law.

18. On 6 November 2010, the District Court (Decision Ac. No. 558/2011) rejected as ungrounded the appeal of the Applicant and approved the Judgment of the Municipal Court.

19. The Applicant filed a request for revision with the Supreme Court of Kosovo, due to essential violation of provisions of the contested procedure and erroneous application of the material law.

20. On 20 September 2013, the Supreme Court (Judgment Rev. No. 93/2013) decided to *"reject the claimant's revision (...) as ungrounded"*.

21. In its reasoning, the Supreme Court held that *"[...] both lower instance Courts, correctly confirmed the factual situation, correctly applied provisions of contested procedure that the claimant refers to and correctly applied the material law, by concluding that the (...) claim is ungrounded. Both challenged Judgments enclose sufficient reasoning for decisive facts, valid for a fair judging of this legal matter, which are recognized by this Court."*

Applicant's allegations

22. The Applicant claims that the Judgment of the Supreme Court *"[...] placed him in an unequal position vis-à-vis his colleague, who was in a same situation, because for the same matter, the same panel decided differently, so that the submitter of the Referral was a victim of injustice and this fact is confirmed by Judgment Rev. No. 246/2013 of 01.10.2013 of the Supreme Court of Kosovo, a Judgment that for the same issue APPROVED the Revision whilst the submitter of this Referral was rejected the Revision."*

23. Thus, the Applicant alleges that the Supreme Court, by rejecting his request for revision and *"(...) by deciding differently in same issues, violated his rights guaranteed by the Constitution, namely Article 3, paragraph 2 [Equality Before the Law], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] and Article 6 [Right to a Fair Trial] of the European Convention on Human Rights (hereinafter, ECHR)"*.

24. The Applicant also notes that, even though he provided the same allegation, *"the Supreme Court for the same issue (...) emphasized that the Law was violated in detriment of claimant concerning the application of disciplinary procedures (...), a circumstance which was not considered by the Supreme Court when deciding on Izjadin Shehu's Revision."*

25. In the end, the Applicant requests from the Constitutional Court to *"invalidate the Judgment of the Supreme Court and remand the case for retrial"*.

Admissibility of the Referral

26. First of all, the Court examines whether the Applicant has fulfilled the Referral admissibility requirements.

27. In that respect, Article 113 of the Constitution provides:

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
[...]

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhausting all legal remedies provided by law."

28. In addition, Article 49 of the Law provides that *"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision".*

29. In the instant case, the Court notes that the Applicant, in order to ensure his rights, used judicial proceedings before the first and second instance courts and, finally, before the Supreme Court of Kosovo. The Court also notes that the Applicant was served with the Supreme Court Judgment on 11 October 2013 and filed his Referral with the Court on 16 December 2013.

30. Thus, the Court considers that the Applicant is an authorized party, has exhausted all legal remedies afforded to him by the applicable law and the Referral was submitted within the four months time limit.

31. However, the Court also must take into account Article 48 (Accuracy of the Referral) of the Law and Rule 36 of the Rules of Procedure.

Article 48 of the Law

In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.

Rule 36 of the Rules of Procedure

"(1) The Court may review referrals only if: (c) The referral is not manifestly ill-founded.

(2) The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:
[...], or
b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights."

32. The Applicant, as said above, challenged before the Supreme Court the Judgment of the Municipal Court and the District Court, due to essential violation of provisions of the contested procedure and erroneous application of the material law.

33. Meanwhile, the Applicant alleges before the Constitutional Court violations of his "*right to equality before the law (Articles 3 and 24 of the Constitution), a*

fair and impartial trial (Article 31 of the Constitution and Article 6 of the ECHR)".

34. In fact, the Applicant claims that the Supreme Court violated the principle of equality before the law and his right to a fair and impartial trial by not approving his request for revision as it did in a later case of his colleague (Judgment Rev. No .246/2013, of 1 October 2013). The Applicant claims that his situation is identical to his colleague's.

35. In support of his claim, the Applicant notes that the Judgment of the Supreme Court rendered on his matter differs from the Judgment of the Supreme Court in a later case (Judgment Rev. No. 246/2013, of 1 October 2013) and argues that *"in relation to (in)equality of parties before the law and contradiction of Courts when deciding on the same issues, (...) a Judgment was rendered to invalidate the Judgment of the Supreme Court of Kosovo and the matter was remanded for retrial".* [The Applicant refers to the Constitutional Court case no. KI120/10, Resolution on Admissibility, 8 March 2013].

36. However, the Court notes that the Supreme Court (in the challenged Judgment Rev. No. 93/2013), when rejecting the revision as ungrounded, held that

> *"From the case file, it results that the respondent implemented a complete disciplinary procedure based on law, against the claimant.*
> *[...]*
> *In support to the above situation, the Supreme Court completely recognizes the legal views of Courts of lower instance, Judgments of which do not consist of essential violations of provisions of contested procedures (...) while the material law was correctly applied.*
> *[...]*
> *Respondent KEC - District in Ferizaj, implemented fully and by law, the disciplinary procedure against the claimant, in compliance with provisions of disciplinary procedures provided by Rules of Procedure."*

37. The Court further notes that the Supreme Court (in the Judgment 246/2013) approved the revision of the Applicant's colleague as partly grounded, because *"(...) no disciplinary proceeding has been conducted for the omissions of the duties for which the claimant was found guilty."*

38. In fact, the Supreme Court has decided in both cases differently, because in one case (Judgment Rev. No. 93/2013) the disciplinary procedures for termination of the contract have been respected, whereas on the other case (Judgment Rev. No. 246/2013) no disciplinary procedures existed.

39. The Applicant referred to the Constitutional Court case KI120/10 – Zyma Berisha apparently intending that the Court would declare his case admissible and invalidate the Judgment of the Supreme Court (Rev. No. 93/2013) as it did so in the Constitutional Court case KI120/10.

40. The Court recalls that the Judgment of the Supreme Court in the case KI120/10 was invalidated because *"[...] the Supreme Court has dealt with the Applicant's case in an evidently arbitrary manner, contrary to the principles elaborated*

by the ECtHR in (...) judgment Nejdet Sahin and Perihan Sahin v. Turkey [GC], no. 13279/05, 20 October 2011." The Court held that *"the Supreme Court's judgment, by neglecting the proper assessment of the Applicant's arguments regarding her permanent employment status, even though they were specific, pertinent and important, fell short of the Supreme Court's obligations under Article 6.1 of the ECHR to fulfill the obligation to state reasons (see mutatis mutandis, ECtHR Judgment of 18 July 2006 in the case Pronina v. Ukraine, Application no. 63566/00; see also the Court's Judgment in Case No. 40/09 Imer Ibrahimi and 48 other employees of the KEK i.e. "KEK I judgment)".*

41. However, based on the documents submitted and completed proceedings, the Court considers that the Supreme Court has not dealt with the Applicant's case in an arbitrary manner and it has not failed to provide a proper assessment of his arguments.

42. Furthermore, in the case KI120/10, the Court noted that all seven cases were identical, whereas the Court is not convinced that the two cases of this Referral are identical because the facts of these cases are different as noted by the Supreme Court.

43. Moreover, the Court recalls the general principles to be applied in cases of conflicting decisions of domestic Supreme Courts in apparently similar situations. In the case of *Nejdat Şahin and Perihan Şahin v. Turkey*, No. 13279/05 of 20 October 2011, the Grand Chamber of the ECtHR stated, inter alia

> *"50. [...] save in the event of evident arbitrariness, it is not the Court's role to question the interpretation of domestic law by national courts (see, mutatis mutandis, Ādamsons v. Latvia, No. 3669/03, para. 118, 10 May 2007). Similarly, on this subject, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings"; it must respect the independence of those courts* (See *Engel and Others v. The Netherlands,* 8 June 1976, para. 103, Series A no. 22; *Gregório de Andrade v. Portugal,* no. 41537/02, para. 36, 14 November 2006)."

44. In addition, the Court recalls that the key principle to be applied in cases of divergence of decisions of the Supreme Court in apparently similar cases or circumstances is whether or not *"profound and long-standing differences exist"* in the case-law of the Supreme Court (see *Nejdat Şahin and Perihan Şahin v. Turkey*, No. 13279/05, para. 53).

45. In Applicant's case, the Supreme Court decision on his Revision is contrasted with only one decision of the Supreme Court which was taken 10 days later. It is difficult to see how, based on only one decision of the Supreme Court, the Court is to conclude that there are "profound and long-standing differences" in the case law of the Supreme Court which threaten the principle of legal certainty and, thereby, infringe the Applicant's rights enshrined in the Constitution and the ECHR.

46. In the case, the Court notes that the Supreme Court responded on the Applicant's allegations with regards to essential violation of contested procedure and application of material law by holding that *"[...] both lower instance Courts, correctly confirmed the factual situation, correctly applied the material law, by concluding that the claimant's statement of claim is unfounded."*

47. The Court considers that the justification provided by the Judgment of the Supreme Court in answering the allegations made by the Applicant is clear, reasoned and fair.

48. The Constitutional Court also reiterates that it does not act as a court of fourth instance, in respect of the decisions taken by the regular courts. It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (See, *mutatis mutandis*, *García Ruiz v. Spain,* No. 30544/96, ECtHR, Judgment of 21 January 1999, para. 28. See also Constitutional Court case No. KI70/11, *Applicants Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).

49. The Constitutional Court can only consider whether the regular courts' proceedings in general and viewed in its entirety have been conducted in such a way that the Applicants had a fair trial (See, *inter alia*, *Edwards v. United Kingdom,* No. 13071/87, Report of European Commission of Human Rights of 10 July 1991).

50. The Court considers that the proceedings before the regular courts, including before the Supreme Court, have been fair and reasoned (See, *mutatis mutandis, Shub v. Lithuania,* No. 17064/06, ECtHR, Decision of 30 June 2009).

51. In this regard, the Court notes that the Applicant has not presented any *prima facie* evidence indicating a violation of his rights under the Constitution (See *Vanek v. Slovak Republic*, No. 53363/99, ECtHR, Decision of 31 May 2005) and did not clarify how the referred articles of the Constitution and ECHR support his claim, as required by Article 113.7 of the Constitution and Article 48 of the Law.

52. In sum, the allegations of a violation of his rights and freedoms are unsubstantiated and not proven and thus are manifestly ill-founded.

53. For the foregoing reasons, the Court considers that, in accordance with Rule 36 (1) c) and (2) b), the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Article 48 of the Law, Rules 36 (1) c), 36 (2) b) and 56 (2) of the Rules of Procedure, on 30 June 2014, unanimously

DECIDES

I. TO DECLARE the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

IV. TO DECLARE this Decision effective immediately

Judge Rapporteur **President of the Constitutional Court**

Almiro Rodrigues Prof. Dr. Enver Hasani